

2012 WL 5231399 (Iowa Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of Iowa.
Des Moines County

Mildred BOZARTH, and Wayne Bozarth, as Executor of the Estate of Gene Bozarth, Plaintiffs,

v.

DANVILLE CARE CENTER, Healthcare of Iowa, Inc, DC Health Partnership, L.C., Millennium Rehab & Consulting Group, Inc., Great River Therapeutics, P.C., Diversacare, L.L.C, Danville Development Company, Donald Chensvold, Tom Wagg, Amy Tressel and Teresa Minnis, Defendants.

No. LALA003599.
April 18, 2012.

Plaintiffs' Brief in Support of Resistance to Defendant Chensvold and Diversacare's Motion for Summary Judgment

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Plaintiff submits the following brief in Support of the Resistance to Defendant Chensvold's Motion for Summary Judgment.

I. KEY FACTS

A Procedural Posture

This action originated after an incident where employees at Danville Care Center picked Gene Bozarth off the ground, cleaned up his badly bloodied face, and carried him to his bed. There he lay until Mr. Bozarth's family drove him to a hospital 21 hours latter. Mr. Bozarth went unchecked the entire night. Perhaps there would be no lawsuit if it were not for the fact that when Mr. Bozarth fell, he broke his neck, his face was crushed with multiple fractures, and he suffered a [broken left hand](#).

Plaintiffs filed suit on January 25, 2010. At that time, the Defendants were Healthcare of Iowa (HCI), Danville Care Center (DCC) and Theresa Minnis. Those defendants delayed the discovery in this case until the Honorable Cynthia H. Danielson sanctioned them on September 23, 2010 for discovery violations.

On March 14, 2011, in preparation for trial against those defendants, the depositions of Donald Chensvold, Theresa Mnnis and Vincent Taeger, the Medical Director of DCC were conducted. Through revelations in those depositions, to be discussed below, plaintiffs amended their complaint on June 1, 2011. The amended complaint added Donald Chensvold, DiversaCare, and other companies (owned by Chensvold and his children) and other individuals that profited of DCC and other nursing homes across the State. Plaintiffs subsequently dismissed these companies and individuals even though we know they did business in, and profited off DCC and its residents. This was a strategic decision to keep this case manageable and to prevent exactly what is happening now, massive litigation by multiple defense firms.

It bears repeating that it has been but one year as of March 14, that we realized there was a cause of action against Chensvold and DiversaCare, and only 10 months since suite was filed against them. Discovery is on going, and in fact, Plaintiffs received Chensvold's and DiversaCare's answer to our interrogatories just last month. Chensvold's and DiversaCare's answers to those interrogatories were incomplete and a motion to compel is before this court. Plaintiff's hereby incorporate those facts as part of this record. *Exhibit 1*. In essence Chensvold and DiversaCare refuses to explain the **financial** interplay and interworking of the various defendant companies that Chensvold owns, and how it is he and they profit off of DCC vis-a-vis resources committed to properly train and staff DCC. This information is wholly and totally under their control, and Plaintiffs have no ability to obtain it elsewhere.

Defendant's Chensvold and DiversaCare filed for Summary Judgment asserting that Plaintiffs have failed to state a claim for which any relief can be granted. For purposes of efficiency, Plaintiffs will reply to both of these claims with this single response. Chensvold and DiversaCare have virtually identically arguments, except that DiversaCare points out that Plaintiffs failed to serve them with answers to their interrogatories. Since their pleading, DiversaCare has been served with answers to their Interrogatories.

B. Facts Giving Rise To The Complaint Against Donald Chensvold and DiversaCare

1. Facts Supporting civil conspiracy and fraud

DCC holds itself out as a Skilled Nursing Home for **elderly** folks in need of care. A State of Iowa Certificate of License lists HCI as the owner of DCC. *Exhibit 2*. Donald Chensvold is under oath as saying he is an owner of HCI, (Deposition of Chensvold, p. 12-13). In Iowa Licensing Records, he is likewise listed as an owner. *Exhibit 2*. HCI is a major corporation that runs/owns at least 18 homes like DCC across the State of Iowa. Deposition of Chensvold, p. 11, l. 12. In Defendant Chensvold's brief he seems to distance himself from HCI as merely "an agent of Healthcare of Iowa in making management decisions for Danville Care Center." Brief in Support of Defendant Donald Chensvold's Motion for Summary Judgment, page 1, paragraph 2.

HCI took over DCC on or around 1996/1997, and HCI assumed operations of the facility, (Deposition of Chensvold at p.22, l. 10). HCI "provides consulting services to long term care facilities ... provides accounting services for long-term care." Deposition Chensvold, p. 10, l. 9-13.

In Chensvold's deposition, he denied that HCI owns DCC (*Id.* at p. 19):

Q. Mr. Chensvold, there's a State of Iowa Certificate of License that lists Healthcare of Iowa as the owner of Danville Care Center. Okay?

A. Okay.

Q. Does Healthcare of Iowa own Danville Care Center?

A. No. -

Q. Who owns Danville Care Center?

A. Danville Development Corporation.

Another one of Chensvold's companies, DiversaCare seemingly offers the same services to DCC. DiversaCare is a "shared service company ... It's an entity that hires and trains nurses, Medicare consultants, Medicare billers, and makes those services available to other nursing facilities so that they don't have to employ a full-time person in that position, they can share those services and costs of it." *Id.* At p.24, l. 4-13.

"DiversaCare is an organization that we use for Consultants." Deposition of Theresa Minnis, p. 94, l. 13-14. DiversaCare also comes to DCC "to look at general care, watch the staff give care, look at medication records." Id at p. 99, l. 4-8.

Another one of Chensvold companies that profits off of the residents at DCC is Millennium Therapy. Millennium "provides therapy services." Id. at p. 27, l. 13).

When asked; "are there possible conflicts of interest?" Chensvold responded "I suppose there could be, but not in this situation, no." (Id at p. 25, l. 13-16).

Chensvold and DiversaCare failed to disclose these relationships in violation of State and Federal law: Owning multiple companies that do business within a Skilled Nursing Home (SNH) such as DCC is something that must be disclosed. [18 U.S.C. Section 1346](#), the Honest Services clause is used to federally prosecute those individuals and companies that do not disclose such relationships. On the application itself, it warns applicants of such peril. While the State of Iowa does not criminalize such behavior, it is a requirement to disclose said relationships nonetheless. *Exhibit 3*. Defendant Chensvold failed to disclose to the Licensing agencies the multiple relationships that exist. In fact, the undersigned is still not exactly clear what the relationships are, because Defendants, each and every one of them, categorically refuse to disclose that information, other than genetically conceding that Chensvold has ownership in all of them.

Another Federal and State requirement for DCC is that it employs a full time Administrator. Sate of Iowa Administrative Code, Chapter 58 Nursing Facilities, 58.8(7) "An administrator of only one facility shall be considered as a full-time employee. Full-time employment is defined as 40 hours per week." It just so happens that DCC Administrator, ?? the licensing entities is Dr. Vincent Taeger. Dr. Taeger is paid \$400 per month, and we believe that we can prove he exists in name only, and does not perform his responsibilities as a Medical Director of a nursing home that houses 40 demanding geriatric patients.

For example, Taeger is responsible "in the development of written rules and regulations applicable to all physicians attending patients in the facility and participate in developing written policies governing the medical, nursing, and related health services provided in the facility," and when asked "Have you developed any written rules or regulations?" He answered "I haven't developed any, no." Deposition of Dr. Vincent Taeger, March 14, 2011, p. 27, l. 13-20. Yet another example, Dr. Taeger is to "be available for consultation and participation in in-service programs." When asked if he as ever done this, his response was "No." Id at p. 29, 114-16. We could go on and on about his failures, but for purposes of this motion, these examples suffice. Dr. Taeger is an example of how resources are not invested into DCC to assure proper resident care. ¹

Dr. Taeger, it seems, views his responsibilities as Medical Director of DCC as the same thing as simply caring for patients at DCC. Apparently, he provides medical care to 27 of the residents there. Deposition of Taeger, P. 32, L. 24. On "the first Tuesday morning of every month, I go to Danville and see my patients on a rotating basis. We're in contact with the nursing home, I would hazard a guess, three, maybe four times a day over the phone ... answering questions about our patients, you know, anything they would need." Id at p. 15, l. 20-25.

When Dr: Taeger was asked point blank if he ever went to DCC outside of his Tuesday morning visits to function otherwise as a Medical Director, he responded, "I've never had to, to my knowledge ... I don't think I've ever been there." Deposition of Taeger, P. 43, L. 10-12.

Finally, with respect to the Medical Director and his ability to even handle this massive responsibility, it appears as if he is overwhelmed with his private practice alone, (Deposition of Taeger, p.34-35,l. 17-6;

Q. How many patients do you have on your caseload, in your workload?

...

A. You mean my total patient number?

Q. Yeah.

A. It's going to be around 5,000. I don't know the exact number.

...

A. Now, those aren't all active. They're all registered to me. As far as active patients that come see me, you're probably talking more around 3000.

It continues (Id at P. 35, L. 17-25);

A. But it's - Our clinic struggles to try and keep enough doctors. We don't lose doctors, but we have so many patients in the area that need physicians, that we actually, occasionally - We just got another - a new physician here, so we reopened for new patients. But for probably the last year prior to that, we didn't take new patients because we just ... can't fit anymore in.

2. *Lack of Training and Qualified Staff.* In addition to having a Medical Director in over his head, so too are the medical providers that perform the day-to-day services of the residents at DCC. Certified Nursing Assistant Sarah Wingate, who took Gene back to his room and left him unattended and in danger of wandering, was the last person to care for Mr. Bozarth before the fall. Ms. Wingate did not know he could get up on his own (Deposition of Sarah Wingate, February 22, 2011, p.21, l. 22-23), and she didn't know he had previously fallen and [broken his hip](#), (*Id.* at p. 22, l. 2-4), which is the whole reason why Mr. Bozarth was at DCC.

Even more telling is Ms. Wingate's recollection, or lack thereof, of training and retention of materials in required training session;

Q. Do they have, like, a typed minutes or something of what's covered? Do they hand anything out, what they're talking about?

A. Yeah, we get handouts or watch videos or they do a presentation.

Q. Okay, What kind of subjects do they cover?

A. We get - there's, like, [abuse](#), like - like different things. I don't know. Like our -- like we cover, like what our job does. Like cares, like falls, like nutrition.

Q. Okay. When was your last one?

A. Our last payday, so it would be like last - not last week but the week before.

...

Q. Okay. Do you remember what the subject matter was of the last one?

A. Well, the last one I didn't get there until, like, the end because I had school.

...

Q. Okay. How about the one before that, then, do you remember what was covered?

A. I'm not sure. I know, like they - like State would - they're talking about when the State comes and surveys us, so we're talking about all the things that we did wrong the last time, like what we got and you know.

...

Q. Okay. And do you remember what any of the deficiencies were, in particular, you were talking about in this last one?

A. No.

Wingate's understanding of body alarms is equally unimpressive, *Id* at p. 58-59.

Q. Do you now anything other than that, that it's this nursing person who makes the choice [of alarm]?

A. No.

...

Q. Okay. Do you know why some are using tethered and some are using pressure [alarms]?

A. No.

Q. There's also policies and procedures about falls and fall prevention. What training have you received on, I know you said you haven't read the manual but as far as just in-service training, what have you received as far as fall prevention protocols and policies at Danville?

A. Like people who are alarmed, don't ever leave them, like, in the bathroom alone or, like, in their wheelchair alone and you have to always make sure they have their alarm and that it's turned on.

After Ms. Wingate left Mr. Bozarth unattended in his room, he was able to get up out of his chair with no alarm sounding and walk down the hallway, where he turned the corner and fell into a wheelchair. This was at 6:35 p.m. Linda Hampton, LPN, was the medical provider who arrived to provide an assessment. Even though a fellow employee saw Mr. Bozarth hit his head on the wheelchair (Deposition of Linda Hampton, February 22, 2011, p. 34, l. 14), even though Mr. Bozarth was laying on the ground, on his recently surgically repaired left hip, (*Id* at p. 35, l. 12), even though he had [lacerations on his face](#), *Id* at p. 39, even though moving him was against DCC own fall protocol, (*Exhibit 6*) she hoisted him up and brought him back to his bed.

Like Ms. Wingate, Ms. Hampton was unprepared and untrained to deal with this situation, *Id* at p. 82-83, l. 23-3;

Q. Does Danville have a policy on how you're to assess pain?

A. I'm sure We do.

Q. Do you know what it is?

A. Specifically, right now, no.

What is more, Ms. Hampton was unable to give back fall protocol at her deposition, *Id* p 69, l. 16-20;

Q. Do you remember there ever being training on fall assessment?

A. Yes

Q. Okay. What do you remember about them?

A. Specifics, I can't tell you specifics right now.

Even the Medical Director, despite a history of falls and citations by the State, was unaware of policies and procedures to help prevent them, Deposition of Taeger, p.48, l.7-12;

Q. So on the - Do you have a policy and procedure in place for risk assessments when folks come in, you know, and your sitting down with them and you're assessing these risks? Do you know if there's policies and procedures in place?

A. I don't.

Regardless, the lack of training and evidence of inadequate care continued. As the night wears on, Mr. Bozarth's condition rapidly deteriorates. By 10 p.m., it was noted that Mr. Bozarth was easily awakened and periorbital discoloration in the left eye and a "bump" to the left eyebrow was noted. *Exhibit 7*. By midnight, it was noted increased periorbital bruising and swelling around the left eye, and forehead, extending all the way to the left check. *Id.* Never the less, Mr. Bozarth went unchecked for the next 9 hours. The next morning, it was noted that there was 4+ pitting edema, purple/blue/red deep bruising to the left hand and face, and [lacerations of the face](#) that weep small amounts of serosanguineous fluid. Finally, at 2:30 p.m., Mr. Bozarth was transported to Great River Medical Center ... ER department.

DiversaCare is responsible for the training of the staff at DCC, including Wingate and Hampton. The list of errors caused by inadequate training is long. For the two days prior to Mr. Bozarth's fall, multiple doses of medication were not given at the 7pm hand out. *See* medical records of Gene Bozarth at DCC. Consequences for these missed doses may result in unsteady gait and cardiac irregularities. The following doses were missed;

-Potassium [Chloride](#) Cap 10 meq to be given at 8am and 7pm (electrolyte replacement)

-Seroquel 25mg one tablet at 7pm (cholesterol)

-Simvastatin 20 mg one tablet at 7pm (cholesterol)

-Metoprolol 25mg one tablet twice daily at 8am and 7pm (antihypertensive/anti-anginal)

Delay in proper assessment and triage (initial assessment following the fall) cannot be denied or ignored. Having made that error, it was compounded through the night and into the next day. Once it became clear his conditioning was worsening and DCC staff still did nothing, they failed in their responsibilities. *See Exhibit 5*. The staff failed to notify Mr. Bozarth's family in a timely manner once his condition changed. Neurological assessments were botched. The manner in which the alarms were used was inadequate, as were the fall prevention methods. These facts are taken directly from the medical records of Gene Bozarth and from Diane Brown's report.

II. MEMORANDUM AND ARGUMENT

1. Chensvold and DiversaCare's Summary Judgment Motions are Premature and Plaintiffs Should be Afforded Additional Time To Conduct Discovery.

The question for today: Is it too early in this litigation to bring a motion for Summary Judgment when discovery has not yet been completed? The present motion is in the nature of an ambush as discovery is not complete. Request for production are outstanding, Interrogatories were incomplete, and Mr. Chensvold necessarily terminated his deposition when he refused to answer any questions about the **financial** connections and gains of all the companies he owns that profit of DCC. Deposition scheduling for DiversaCare's corporate representative are currently trying to be scheduled. As the court is aware, there is a Motion to Compel on most of these issues.

Carter v. Jernigan. 227 N.W.2d 131, 135 (Iowa 1975) stands for the proposition that a party against whom a summary judgment motion is made should first be allowed to discover the facts if he desires. What is more, that the facts Plaintiffs want to uncover, i.e. the interconnection of all these entities, are totally outside our control. This very scenario was discussed in *Miller v. Continental Insurance Company*. 392 N.W. 2d 500, 503 (Iowa 1986).

This is a case where the facts which plaintiffs must prove are peculiarly within the knowledge of defendants. Some of these facts may be crucial to plaintiffs' claims. Under such circumstances, we conclude it would be unjust to plaintiffs to require ruling on defendants' motion for summary judgment before plaintiffs have an opportunity to complete reasonable discovery. See *Carter*. 227 N.W. 2d at 135-36. There is no substantial prejudice to defendant in delaying a disposition on the motion for summary judgment until plaintiffs' motion to compel has been considered by the district court.

Despite the fact that trial is in August, the case against Chensvold and DiversaCare is still young. As mentioned, Plaintiffs were totally unaware of the interplay of Chensvold's multiple business dealings until the depositions of Chensvold, Minnis and Taeger last March. What is more, the delay tactics and hiding of the ball by the defense have contributed to everyone being under the gun. The defendants cannot invite an error or cause delay and then claim Plaintiffs are not complying with Court rules and orders. Consequently, the Court should deny Defendant's motion.

2. The Evidence In The Record Demonstrates The Existence Of Issues Of Material Fact For Punitive Damages, Fraud and Negligence.

The granting of Summary Judgment is employed with caution, lest worthwhile causes perish short of determining the merit. It is proper only when it is clear what the truth is, and no genuine issue remains at trial. The burden is upon the movant to show an absence of any genuine issue of material fact. *Peppmeier v. Murphy*. 708 N.W.2d 57, 58 (Iowa 2005).

Punitive Damages

Iowa Code Section 668A. 1 sets the standard for awarding punitive damages:

a. Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct from the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.

“Willful and wanton” in the context of this statute mean that “the actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.” *Fell v. Kewanee Farm Equip., Co.*, 457 N.W.2d 911, 919(Iowa 1990).

Punitive damages serve as a “form of punishment to deter others from conduct which is sufficiently egregious to call for the remedy.” *Coster v. Crookham*, 468 N.W.2d 802, 810 (Iowa 1991). Such damages are appropriate when actual or legal malice is shown. *Schultz v. Security Nat'l Bank*. 583 N.W.2d 886, 888 (Iowa 1998). Legal malice is shown by wrongful conduct committed or continued with a willful or reckless disregard for another's rights. *Id.*

Punitive damages in a healthcare setting against a corporate Defendant and an individual defendant are not unheard of in Iowa. See *McClure v. Walgreen Co.*, 613 N.W.2d 225 (Iowa 2000). In *McClure*, Walgreens Pharmacy was sued by a plaintiff whose prescription was misfiled and was not warned about the side effects of the drug Paxil. The Iowa Supreme Court allowed the punitive damages claim to stand because Walgreens was aware of thirty-four incident reports involving the same dispensing error the Plaintiff complained of in the prior three years. The court held that a jury could reasonably infer that Walgreens had a serious problem in this regard, knew it had a problem, but did not take adequate steps to correct the problem.

Such is the case here. DCC has a history with residents getting hurt because of failures in fall prevention, proper training, and repeated environmental hazards that create fall hazards. *Exhibit 5*. Since 2004, at least 6 residents got hurt that resulted in 5 violations. Of particular concern, given the lack of awareness and training by the staff in this event, is the December 2006 deficiency. It was specifically found that “No documents regarding initial training and technique review, orientation to lifting and transfer techniques or the signature of the licensed RN or LPN Facility were found in the record review.” *Id.* at 15.

We have asked for training records and while we volumes of paper work from Defendants DCC, HCI, DiversaCare, Chensvold and Minnis, to date there is not a shred of documentation, proof of attendance or orientation/training to prevent falls and what to do if there one. Such education is required required by law.

Of equal concern is the 2004 violation that found residents suffered numerous falls with the use of Personal Alarms due to the inadequate method of attaching the alarm to the resident. While we contest the fact that the alarm was even placed on Mr. Bozarth, if it was, as the defendants claim, it was obviously done so that he could easily remove it. Indeed it wasn't but minutes from when Mr. Bozarth was placed in his chair that he was able to self ambulate without an alarm sounding, and walk down the hallway and fall. Deposition of Wingate, p. 19, l. 5-7.

Moreover, when you parse through the depositions, the hallways continue to present the same fall hazards. There are desks, linen supply carts, empty wheelchairs, and residents milling around to watch TV. Deposition of Wingate P. 28-31, and Hampton P. 49-52. Given that the Medical Director is responsible for preventing these types of events, and when they do happen, to come up with a course of correction, it is no wonder these repeated violations keep reoccurring. The willful act to pay the Medical Director \$400 creates the obvious risk that he will not perform his function. That DCC knew he was not performing his functions should go without saying.

Chensvold is individually responsible. As to Defendant Chensvold, Iowa law generally imposes individual liability on corporate officers for their own torts, even when acting in their official corporate capacity. *Haupt v. Miller*, 514 N.W.2d 905, 907-09 (Iowa 1994); *Briggs Transp. Co. v. Starr Sales Co.*, 262 N.W.2d 805, 809 (Iowa 1978); *Grefe v. Ross*, 231 N.W.2d 863, 868 (Iowa 1975); *White v. Int'l Text-Book Co.*, 173 Iowa 192, 194, 155 N.W. 298, 299 (1915) (“The corporation and its servants, by whose act the injury was done, may be joined in an action of tort in the nature of trespass.” (Quotations omitted)); *Restatement (Third) Agency § 7.01, at 115 (2006)* (“An agent is subject to liability to a third party harmed by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment”). In adopting this rule, we reasoned that the legal status of a corporation as an independent entity was not created to insulate officers from liability for their own tortious conduct, but was only intended to generally insulate shareholders from individual liability for corporate conduct and officers from liability for corporate contracts. *Haupt*, 514 N.W.2d at 909.

To impose individual liability, however, the corporate officer must personally participate in the tortious conduct. *Id.* In the instant case, there is no doubt that Chensvold participated in this scheme. As signor of the license application and renewals (*Exhibit 3*), he withheld and failed to disclose that which he had a legal requirement to do. As owner of these outfits, and being a manager of at least HCI, he is responsible for it's actions.

Moving on, Danville Care Center holds itself out as a licensed Skilled Nursing Home. As such, people are entitled to trust that the license they hold complies with legal requirements. When Chensvold, DiversaCare, DCC and HCI failed to comply with the legal requirements imposed on SNH by the State of Iowa and the United States of American, you have a breach of duty. Here, the breaches are significant. They failed to disclose all the entities that will profit off of the residents at DCC, they failed to adequately train its staff, it failed to employ a Medical Director that actually did his job, they falsely reported staffing hours by double dipping its Administrator as an RN. These failures, both intentional and negligent, resulted in damages to Mr. Bozarth and his family.

The element of deterrence is significant in this case for two reasons. First, DCC has a repeated history of this type of conduct. Second, HCI is a major player in the State of Iowa and if it is running DCC in this fashion, there is a chance this conduct will spread to other facilities, if not already. Third, facilities that profit off of the **elderly** must be told it is not okay to indifferently warehouse these vulnerable souls until they die. Beyond the suffering of the **elderly**, dignity in death means an awful lot to the loved ones that carry on the memory of the deceased. The Bozarth children, particularly the daughter that saw her dad in the bruised state, and then drove him to the emergency room, carries her own guilt that she drove him upright on a bumpy car ride with a **broken neck**. This memory alone tarnishes what was otherwise an incredible life.

WHEREFORE, the undersigned requests the Court to deny Defendant Chensvold and DiversaCare's request for summary judgment pursuant to I.R.Civ.P. 1. 981(2).

Dated this 16th day of April 2012.

TRIAL LAWYERS FOR JUSTICE, P.C.

By <<signature>>

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Footnotes

- 1 When deficiencies are found at Nursing Homes by the State of Iowa, the Medical Director is required to investigate the event, write a report and make suggestions on how to fix the problem. In the years prior to Mr. Bozarth's fall, DCC was cited for numerous "Environmental Hazards," risk prevention and training deficiencies. *See* Report of Diane Brown, *Exhibit 5*. Never did Dr. Taeger perform these tasks, and after Mr. Bozarth's fall (yet again DCC was sanctioned by the State for Environmental Hazard), the first time Dr. Taeger heard of the fall was almost two years later when he received his subpoena for testimony in the above captioned matter. Deposition of Vincent Taeger, March 114, 2011, p. 49, 17-15.